Nos. 91-374 and 91-620

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANK J. CASO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN R. KIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury that it is not a defense to the charge of conspiring to convey government property without authority that the defendants had permission to convey the property from a government employee who lacked the authority to give such permission.

2. Whether the district court properly declined to give a jury instruction that the existence of a "good faith" belief on the part of the defendants that they were authorized to convey government property is a defense to the charge of conspiracy to convey such property without authority.

3. Whether the district court properly informed the jury of the elements of the substantive offense that petitioners were charged with conspiring to violate.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-374

FRANK J. CASO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 91-626

JOHN R. KIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26)[1] is unpublished, but the decision is noted at 935 F.2d 1288 (Table).

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[1] "Pet. App." refers to the appendix to the petition in No. 91-374.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1991. A petition for rehearing was denied on July 23, 1991. Pet. App. 27-28. The petition for a writ of certiorari in No. 91-374 was filed on September 3, 1991. The petition for a writ of certiorari in No. 91-626 was filed on October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of conspiring to defraud the United States by interfering with lawful government functions and conspiring to violate 18 U.S.C. 641 by conveying property of the United States without authority, in violation of 18 U.S.C. 371. Petitioners were sentenced to two years' imprisonment, all but six months of which was suspended in favor of probation, and a $5,000 fine. In an unpublished opinion, the court of appeals affirmed. Pet. App. 1-26.

1. The evidence at trial showed that petitioner Caso worked as a market researcher for Hughes Aircraft Co., a defense contractor. Petitioner Kiely worked as a market researcher for Raytheon Corp., also a defense contractor. Both held "secret" security clearances because their jobs included receiving and handling classified documents given to them by government officials.

Together with others, petitioners engaged in a conspiracy to conduct an "underground market" in internal budgeting and planning documents that the Department of Defense (DOD) used to reach decisions on its funding priorities. Pursuant to the

scheme, one defense contractor employee would obtain critical budget documents from a source at DOD, make a copy, and then pass the documents on to a friend or colleague who worked for another defense contractor. Pet. App. 9, 13.

Some of the documents improperly acquired or traded by petitioners were sent from the Secretary of Defense and his deputy directly to the secretaries of the military departments to describe the goals to be achieved by DOD. Other documents came from the military departments and were created in response to the Secretary's directives; these documents outlined how each department would allocate its resources. Some documents reflected debates within the Pentagon on budget priorities, while other documents indicated final decisions on budgets and program funding. In the aggregate, the documents revealed the thought processes of DOD on critical funding issues, and thus constituted an invaluable resource for defense contractors. Pet. App. 3.

The documents at issue were internal DOD documents that were not to be released to defense contractors. Each document contained a substantial number of pages marked "secret." In addition, the documents contained such warnings as "NOT RELEASABLE TO CONTRACTORS/CONSULTANTS" or "REPRODUCTION OF THIS DOCUMENT IN WHOLE OR IN PART IS PROHIBITED EXCEPT WITH THE PERMISSION OF THE ISSUING OFFICE." Through the ongoing security clearance process petitioners were frequently made aware of the procedures regulating the handling and distribution of classified material. Pet. App. 4.

Petitioners took extraordinary measures to avoid detection. They falsified the names and sources of

the documents in their companies' document control systems; they removed the "secret" and "confidential" markings from the documents; they maintained separate mail boxes to receive documents; they mailed "secret" documents to fellow defense contractor researchers at home; they took elaborate steps to hide the documents when their offices were inspected by DOD investigators; and they exchanged the documents in surreptitious ways. Pet. App. 5 & n.*.

2. The indictment charged that petitioners' conspiracy had three objects: (1) to defraud the United States by unlawfully interfering with the DOD's planning, programming, and budgeting function; (2) to defraud the United States by unlawfully interfering with DOD's industrial security system; and (3) to convey without authority property of the United States, in violation of 18 U.S.C. 641. Pet. App. 46-48, 57-58. One of petitioners' defenses to the charge of conspiracy to convey government documents without authorization was that they obtained the classified documents as part of an "informal DOD policy" to place sensitive but helpful budget documents in the hands of defense contractors. *Id.* at 4. Pursuant to that defense, petitioners asked the district court to instruct the jury that it should acquit if the evidence left a reasonable doubt as to whether DOD "either officially *or unofficially*" released the classified documents to petitioners. Pet. 16 (emphasis added).

The district court declined to give the requested instruction, ruling that unofficial authorization was not a valid defense. Pet. App. 21. Instead, the court instructed the jury that

> [t]he term without authority means the conveyance was made without the permission and consent of a Government official who is actually

> authorized to give that consent. In other words, it would not be enough that the defendant had the permission and consent of a Government employee unless that employee had the actual authority to give the defendant permission and consent to convey the document.

Id. at 59-60.

Petitioners also requested the district court to instruct the jury that it should acquit if it found that the defendants "in good faith reasonably believed" that they were authorized to convey the classified documents. Pet. App. 49. The court refused to give such a good faith instruction with respect to the conspiracy to defraud the United States, holding that good faith was not a defense. *Id.* at 24. The court, however, instructed the jury that it must find that the defendant acted fraudulently in conspiring to defraud the United States, and that "fraudulent" means "done with an intent to deceive or cheat." *Id.* at 58. The court also instructed the jury with respect to the overall conspiracy that, in order to convict, it must find that the defendant acted "willfully"—that is, "voluntarily and intentionally and with a specific intent to do something the law forbids"—and "knowingly"—that is, "voluntarily and intentionally and not because of mistake or accident or other innocent reason." *Id.* at 56.

With respect to the conspiracy to convey government property without authority, the court, without using the term "good faith," gave the following instructions:

> It is not enough * * * for the Government to prove that the conveyance was without authority. The Government must also prove that the defendant either knew that the conveyance was

without legal authority, or that the defendant acted with reckless disregard as to whether the conveyance was authorized.

* * * * *

It is a defense to a charge of conspiracy to convey without authority that the defendant either had actual authority or that he believed he had authority, and that this belief was reasonable under all of the circumstances. * * *

* * * * *

[Y]ou may infer that the defendant acted knowingly if you conclude that the defendant had a conscious purpose as opposed to negligence or mistake to avoid learning an existing fact. That you may infer this however does not relieve the Government of the duty to or the obligation to prove both that the defendant acted knowingly and willfully by proof beyond a reasonable doubt.

In defining the term willfully, I said the defendant must have acted with specific intent. Specific intent, as the term implies, means more than the general intent to commit an act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Pet. App. 60, 61, 62-63.

3. On appeal, petitioners challenged the district court's refusal to instruct the jury on the defense of "unofficial authorization." The court of appeals agreed with the district court that unofficial authorization is not a valid defense to a charge of conspiring to convey government property without authorization; accordingly, the court found that the district court properly refused to give such an instruction. Pet. App. 21. The court of appeals also stated that

the instructions to the jury made clear that the government had to show either that the defendants knew they lacked official authorization, or that they acted with reckless disregard in failing to know that fact; that negligence or mistake on the defendants' part was not enough; and that knowledge could be inferred if the defendants had a conscious purpose to avoid learning the truth. *Id.* at 22-23. The court concluded that those instructions accurately stated the law and protected against conviction any person who reasonably believed that he acted with authority or was no more than negligent in failing to know that he lacked authority. *Ibid.*

The court of appeals also rejected petitioners' claim that the district court had erred in failing to give a good faith instruction. The court noted that, fairly read, the instruction that the unauthorized conveyance of government property must have been done willfully and with knowledge or reckless disregard "logically carries over" to the other objects of the conspiracy, because "the conspiracy to defraud the government by compromising its classified document system necessarily involves conveying of documents." Pet. App. 24-25. Moreover, the court of appeals determined that "the so-called good faith defense is logically and legally incompatible with a standard instruction on willful conduct," because "a defendant cannot act with 'a purpose to disobey the law' and yet 'believe[] in good faith that his actions were legal'—the former being the actual jury instruction and the latter being the instruction sought by defendants." *Id.* at 25. The court also found that "the so-called good faith instruction is subsumed in the charge that a defendant cannot be convicted unless the jury finds that he acted with 'purpose to disobey or disregard

the law.'" *Ibid.* The court therefore concluded that the "instruction sought would have been superfluous." *Ibid.*

ARGUMENT

1. Petitioners contend (91-374 Pet. 15-19; 91-626 Pet. 14-18) that the district court erred in declining to instruct the jury on "unofficial authorization," and instructing instead that it was no defense to the charge of conspiracy to convey government documents without authorization that the defendants received permission from a government employee who had no actual authority to give such permission.[2] The instruction petitioners desired, however, is contrary to the requirements governing the dissemination of DOD documents.

DOD Directive 7045.14 (May 1984) provides that budgetary data of the type contained in the documents at issue here "may not be released outside the Executive Branch of the government without the expressed written consent of the Assistant Secretary of Defense (Comptroller)." C.A. Joint App. 490. Many

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[2] Although petitioners contend that the evidence showed the existence of an unofficial, authorized system for distributing classified budgetary material to contractors, the testimony established nothing of the kind. Petitioners rely primarily on the testimony of two DOD officials, Carolyn Chewning and Thomas Christie. But the testimony of Chewning on which petitioners rely was given at a different trial six years earlier. In the instant case, she testified that her previous testimony was the result of confusion, that documents of the sort involved here are not releasable to DOD contractors, and that she had never seen such material released unofficially. Gov't C.A. Br. 12-13. Christie testified that, while he had released classified budgetary material to an employee of Grumman, he had done so solely on his own initiative and without authority. *Id.* at 13.

of the documents disseminated by petitioners carried warnings reflecting the substance of that directive, such as "NOT RELEASABLE TO CONTRACTORS/CONSULTANTS" or "the DOD estimates contained in this issue will not be furnished to anyone outside the executive branch without . . . express written consent." Pet. App. 4, 9. In light of the DOD directive, any form of "unofficial authorization," without the written consent of the Assistant Secretary of Defense, was no authorization at all. Accordingly, the district court was correct in refusing to give an "unofficial authorization" instruction.

In support of their position that they did not need official permission to convey the classified documents, petitioners rely on DOD's *Industrial Security Manual for Safeguarding Classified Information* (1985), (ISM), which establishes the requirements for acquisition, dissemination, and handling of classified information by contractors and their subcontractors, vendors, and suppliers. GX 20-S. In particular, petitioners insist (91-374 Pet. 19; 91-626 Pet. 17-18) that ISM § 3(e) gives any "possessor" of a classified document the unrestricted authority to determine the propriety of further dissemination based upon a need to know and an appropriate security clearance.[3] Sec-

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[3] ISM § 3(e), GX 20-S, at 4, defines the term "[a]uthorized [p]ersons" to mean

> those persons who have a need-to-know for the classified information involved and have been cleared for the receipt of such information * * *. Responsibility for determining whether individuals' duties require that they possess, or have access to, any classified information and whether they are authorized to receive it rests on the individual who has possession, knowledge, or control of the information involved, and not on the prospective recipients.

tion 3(e), however, presupposes that the person who conveys a classified document is authorized to possess the document in the first place;[4] petitioners' contrary reading leads to the absurd result that a person who comes to possess a document unlawfully has the authority to disseminate it further. Here, petitioners admitted possessing the classified documents without the requisite written consent of the Assistant Secretary of Defense; therefore, their dissemination of the documents was not protected by ISM § 3(e).

2. Petitioners also contend (91-374 Pet. 19-25; 91-626 Pet. 18-23) that the district court erred in refusing to give a separate instruction to the jury that it was a defense to the conspiracy charge that they had acted in "good faith." The court of appeals correctly held that the instructions on willfulness, knowledge, and specific intent were adequate to guide the jury's deliberations, without a separate good faith instruction. Pet. App. 24-25.

In the context of criminal tax prosecutions, this Court has held that, when the jury is adequately instructed on willfulness, an additional instruction on good faith is unnecessary. *Cheek* v. *United States*, 111 S. Ct. 604, 610 (1991); *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam). Because willfulness in that context means "a voluntary, intentional violation of a known legal duty," the Court held that a willfulness instruction already incorporates the element of bad faith or evil motive.

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[4] ISM § 3(e) applies only to "classified information," which is defined as information that is designated as such; information that is owned or controlled by the government; and information that is determined under applicable executive orders to require protection against "unauthorized disclosure." ISM § 3(k), GX 20-S, at 4.

111 S. Ct. at 610; see *Pomponio*, 429 U.S. at 12. The same principle has been applied more generally to criminal statutes requiring proof that the defendant acted with specific intent. As one court of appeals has explained, "where the court properly instructs the jury on the element of intent to defraud—essentially the opposite of good faith—a separate instruction on good faith is not required." *United States* v. *Dockray*, No. 90-2224 (1st Cir. Sept. 5, 1991), slip op. 5; accord *United States* v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *United States* v. *Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), cert. denied, 474 U.S. 925 (1985); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981); *United States* v. *Rothman*, 567 F.2d 744, 752 (7th Cir. 1977); cf. *United States* v. *McGuire*, 744 F.2d 1197, 1201, 1202 (6th Cir. 1984) (finding any error in failing to instruct on good faith to be harmless because "[t]he instructions with regard to specific intent adequately informed the jury of the defendants' theory of the case"), cert. denied, 471 U.S. 1004 (1985).

Petitioners assert that the Fifth, Eighth, and Tenth Circuits require a good faith instruction to be given even if the jury is instructed on willfulness and specific intent, and that the rule followed by those courts conflicts with the decision in this case. 91-374 Pet. 21; 91-626 Pet. 19, citing, *inter alia*, *United States* v. *Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States* v. *Casperson*, 773 F.2d 216, 223 (8th Cir. 1985); *United States* v. *Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc). See also *Green* v. *United States*, 474 U.S. 925 (1985) (White, J., dissenting from the denial of certiorari). Petitioners overstate the extent of the circuit split. The Fifth Circuit has abandoned the rule advanced in

United States v. *Goss*, *supra*, that a separate good faith instruction is required. See *United States* v. *Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986); *United States* v. *Rochester*, 898 F.2d 971, 978-979 (5th Cir. 1990). As the First Circuit has observed, "[i]f there is a discernible trend on this issue, it seems to be moving against" the requirement of a separate instruction on good faith. *United States* v. *Dockray*, slip op. 6. In any event, this case does not present the issue on which the courts of appeals have disagreed. In none of the cases cited by petitioners did the district court, in addition to instructing on willfulness and specific intent, give an instruction that clearly set forth the good faith defense although not using that specific phrase. That is the case here.

The district court's instructions set forth in detail the requirements of willfulness, knowledge, and specific intent. Pet. App. 56, 62-63. In addition, the instructions conveyed the essence of petitioners' proposed instruction that the jury should acquit if it found that petitioners "in good faith *reasonably* believed" that they were authorized to convey the classified documents. *Id.* at 49 (emphasis added). The court instructed the jury that "[i]t is a defense to a charge of conspiracy to convey without authority that the defendant * * * believed he had authority, and that this belief was reasonable under all of the circumstances." *Id.* at 61.[5] It is well settled that

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[5] Petitioners take issue (91-374 Pet. 25; 91-626 Pet. 23) with the "reasonableness" requirement in the court's instruction. But petitioners' present objection to the "reasonableness" instruction constitutes an about-face from their position in the district court; their own proposed good faith instruction contained just such a reasonableness requirement. Pet. App. 49.

the district court has considerable latitude in the manner in which an instruction is formulated and that it need not adopt the precise wording of the defendant's proposed instruction. See *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 110 S. Ct. 1300 (1990); *United States* v. *McGuire*, 744 F.2d at 1201; *United States* v. *Gaines*, 690 F.2d 849, 856-857 (11th Cir. 1982). The difference between the good faith instruction proposed by petitioners and the instruction given by the district court is not one of substance.[6]

Petitioners also argue (91-374 Pet. 22-23; 91-626 Pet. 21-23) that the district court gave no instructions on good faith with respect to the conspiracy to defraud the United States. The court of appeals, however, correctly explained that the charge of conspiracy to defraud the United States by compromising its classified document system was predicated on petitioners' unauthorized conveyance of the classified documents. Accordingly, the court concluded that the instructions discussed above—that the defendants could be convicted only if the jury found that they

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[6] Relying on two Fourth Circuit decisions, petitioners argue (91-374 Pet. 25; 91-626 Pet. 23) that the district court should not have told the jury that it could convict if it found that they "acted with reckless disregard as to whether the conveyance was authorized." There was no danger, however, that the jury might have been misled into convicting petitioners for carelessness as opposed to knowing misconduct. The court also instructed the jury that the requisite state of mind for conviction required that petitioners had "a conscious purpose as opposed to negligence or mistake to avoid learning" the truth. Pet. App. 62. Reading the jury instructions as a whole, the conscious purpose instruction ensures that the reckless disregard instruction did not permit a conviction for negligence. See *United States* v. *Fowler*, 932 F.2d 306, 317 (4th Cir. 1991).

acted willfully and with knowledge that they did not have authorization for the conveyance—"applie[d] with full force to all the offenses charged." Pet. App. 24-25. The same analysis applies to the instruction that it was a defense to the unlawful conveyance charge that the defendant had a reasonable belief under all of the circumstances that he was authorized to make the conveyance. *Id.* at 61.

3. Finally, petitioners contend (91-374 Pet. 25-26; 91-626 Pet. 23-24) that, in instructing the jury on the conspiracy charge, the district court improperly set out the elements of the substantive offense that petitioners were charged with conspiring to violate—unlawful conveyance of government property under 18 U.S.C. 641. That claim is without merit. The district court carefully instructed the jury on the crime of conspiracy, Pet. App. 54-56, and prefaced its instruction on the elements of Section 641 with the following, Pet. App. 58-59:

> It is important to remember that the defendants are not charged with violating [Section 641]. They are charged with conspiring to violate that section. And that is an important distinction. The crime of conspiracy to convey without authority is an independent offense, separate and distinct from the actual violation of conveyance without authority.

In light of that instruction, the jury could not have been confused by the instruction on the substantive offense of unlawful conveyance. Indeed, the instruction on the substantive offense was entirely proper, because, in order to determine whether petitioners conspired to violate Section 641, the jury needed to know what conduct would constitute the substantive violation. Petitioners cite no case holding that it is

reversible error to inform the jury of the nature of the substantive offense that the defendant is charged with conspiring to commit.[7]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[7] *United States* v. *McCoy*, 539 F.2d 1050 (5th Cir. 1976), cert. denied, 431 U.S. 919 (1977), the only case cited by petitioners (91-374 Pet. 26; 91-626 Pet. 24), stands for the proposition that *failure* to instruct the jury on the nature of the underlying substantive offense is not reversible error.

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